



NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW AND COMMERCIAL REGULATION

Volume 21 | Number 2

Article 8

Winter 1996

Euromepa v. Esmerian: The Scope of the Inquiry Into Foreign Law When Evaluating Discovery Requests under 28 U.S.C. sec. 1782

Richard D. Haygood

Follow this and additional works at: <http://scholarship.law.unc.edu/ncilj>

Recommended Citation

Richard D. Haygood, *Euromepa v. Esmerian: The Scope of the Inquiry Into Foreign Law When Evaluating Discovery Requests under 28 U.S.C. sec. 1782*, 21 N.C. J. INT'L L. & COM. REG. 491 (1995).

Available at: <http://scholarship.law.unc.edu/ncilj/vol21/iss2/8>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Journal of International Law and Commercial Regulation by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

Euromepa v. Esmerian: The Scope of the Inquiry Into Foreign Law When Evaluating Discovery Requests under 28 U.S.C. sec. 1782

Cover Page Footnote

International Law; Commercial Law; Law

***Euromepa v. Esmerian: The Scope of the Inquiry Into Foreign Law
When Evaluating Discovery Requests Under 28 U.S.C. sec.
1782***

I. Introduction

In the business community today, companies are striving to become players in the global marketplace. As a result, international litigation has become much more common. The volume of cases where persons and information situated in the United States are the subjects of litigation in foreign judicial systems has kept pace with the growth of international litigation. The United States has had a system for dealing with discovery requests from foreign jurisdictions since the early days of the Republic.¹ However in 1964, Congress drafted amendments to 28 U.S.C. section 1782² to broaden the power of district courts to render discovery assistance to foreign and international tribunals.

One of the goals of section 1782 was to provide efficient assistance to foreign litigation,³ and courts have struggled to develop consistent standards to evaluate applications for discovery under this statute.⁴ In *Euromepa S.A. v. R. Esmerian, Inc.*,⁵ the Court of Appeals for the Second Circuit considered this question and addressed the appropriate factors that should be relied upon by a district court.⁶ The case involved a discovery request for information and depositions pertaining to an appeal pending in France.⁷ The district court denied the discovery request,⁸ but the Second Circuit reversed the district court's decision.⁹ *Euromepa* is important because the Second Circuit considerably narrowed the scope of the inquiry into the foreign

¹ See Walter B. Stahr, *Discovery under 28 U.S.C. § 1782 for Foreign and International Proceedings*, 30 VA. J. INT'L L. 597, 600-605 (1990).

² 28 U.S.C. § 1782 (1988). This statute permits foreign tribunals and other interested persons to apply to the district court for discovery of any person or information residing in the United States. 28 U.S.C. § 1782(a) (1988).

³ See S. REP. NO. 1580, 88th Cong., 2d Sess. 9 (1964) [hereinafter Senate Report], reprinted in 1964 U.S.C.C.A.N. 3782, 3792-94.

⁴ See Hans Smit, *Recent Developments in International Litigation*, 35 S. TEX. L.J. 215 (1994).

⁵ 51 F.3d 1095 (2d Cir. 1995).

⁶ *Id.*

⁷ *Id.*

⁸ See *In re Application of Euromepa, S.A.*, 155 F.R.D. 80, 84 (S.D.N.Y. 1994). The district court denied discovery because it found that allowing discovery would "infringe on the French courts while not promoting the efficiency of the pending appeal in France." *Id.*

⁹ *Euromepa*, 51 F.3d at 1102.

jurisdiction's procedural and substantive law.¹⁰ In the Second Circuit, district courts cannot conduct "extensive examinations of foreign law regarding the existence and extent of discovery in the foreign country."¹¹ Rather, a district court must grant the discovery request unless there is a judicial, executive, or legislative declaration that such assistance would be unwelcome.¹²

This Note will explore the facts and holding of *Euromepa* in Part II.¹³ Part III of this Note will explore the background law,¹⁴ and Part IV will provide an analysis of the court's opinion.¹⁵ Finally, this Note will conclude that the Second Circuit's opinion does not place enough importance on the nature and attitudes of the foreign jurisdiction toward the U.S. approach to discovery, and removes too much of the district court's discretion to determine whether to grant the discovery request.¹⁶

II. Statement of the Case

A. Facts

Euromepa, a French insurance brokerage firm, provided insurance to a jewelry dealer who was selling certain jewelry owned by Esmerian, a New York jewelry designer.¹⁷ Euromepa represented to the dealer that insurance for "infidelity of courier" was unnecessary because the risk was so small with the selected courier.¹⁸ Relying on that representation, the jewelry dealer changed its policy and dropped its coverage.¹⁹ Jewelry valued at more than twenty-six million dollars was never returned.²⁰ The trial court found Euromepa liable to Esmerian for over ten million dollars, and Euromepa appealed.²¹ Euromepa sought deposition and discovery of documents relating to the value of the jewelry from Esmerian in the Southern District of New York under section 1782.²²

B. The District Court

In considering Euromepa's request, the district court was

¹⁰ *Id.*

¹¹ *Id.* at 1099.

¹² *Id.* at 1100.

¹³ See *infra* notes 17-46 and accompanying text.

¹⁴ See *infra* notes 47-106 and accompanying text.

¹⁵ See *infra* notes 107-172 and accompanying text.

¹⁶ See *infra* notes 173-181 and accompanying text.

¹⁷ *In re Application of Euromepa, S.A.*, 155 F.R.D. 80, 81 (S.D.N.Y. 1994). The jewelry was to be shown for sale in the United Arab Emirates. *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 82.

²² *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1097 (2d Cir. 1995).

compelled to consider the nature and attitudes of the French government towards discovery under the Federal Rules of Civil Procedure.²³ After an inquiry into French discovery procedures, the district court concluded that the French system did not allow parties to seek discovery without judicial intervention.²⁴ When making its inquiry into the nature of French discovery procedures, the district court considered the fact that Euromepa had not attempted to use the French discovery process before applying for discovery pursuant to section 1782.²⁵ The district court held that granting the discovery request would infringe on the power given to the French courts by their legislature,²⁶ and therefore denied the petition.²⁷

C. The Court of Appeals

The Court of Appeals for the Second Circuit reversed the denial of Euromepa's petition for discovery.²⁸ The Second Circuit found that the district court improperly followed prior case law, and that the district court "misperceived the extent to which it should construe foreign law in deciding whether to order discovery."²⁹ Specifically, the Second Circuit found that the district court's analysis placed too much emphasis on Euromepa's failure to request discovery in France, despite the district court's explicit rejection of the quasi-exhaustion

²³ *Application of Euromepa*, 155 F.R.D. at 82; see Senate Report, *supra* note 3, at 3792-94. The district court also followed the direction of the Court of Appeals for the Second Circuit and considered "the balance between litigants that each nation creates within its own judicial system." *Application of Euromepa*, 155 F.R.D. at 82 (quoting *In re Application of Gianoli*, 3 F.3d 54, 60 (2d Cir. 1993)).

²⁴ *Application of Euromepa*, 155 F.R.D. at 83.

²⁵ *Id.* Nevertheless, the district court stated that it was not necessary for Euromepa to exhaust all discovery requests in France before seeking discovery under section 1782. *Id.* (citing *In re Application of Malev Hungarian Airlines*, 964 F.2d 97, 100 (2d Cir. 1992), cert. denied, 113 S.Ct. 179 (1992)).

²⁶ *Application of Euromepa*, 155 F.R.D. at 83. The district court determined that the French system allowed very minimal pre-trial discovery. Unlike the American system, which allows the parties to control the discovery process, the French system requires the judge to order the production of each piece of evidence sought. If it granted the section 1782 petition, the district court believed that the discovery sought would be far more expansive than that which the French procedure would allow. *Id.*

²⁷ *Id.* at 84.

²⁸ *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1102 (2d Cir. 1995). The court acknowledged that it reviewed the district court's decision for an abuse of discretion, but stated that "when the district court's analysis is decided on inappropriate grounds the appellate court should reverse." *Id.* at 1097 (citing *Malev Hungarian Airlines*, 964 F.2d at 99); see also *Independent Oil & Chem. Workers v. Proctor & Gamble*, 864 F.2d 927, 929 (1st Cir. 1998) (stating that "abuse occurs . . . when an improper factor is relied upon"). But see *Malev Hungarian Airlines*, 964 F.2d at 104 (Feinburg, J., dissenting). Judge Feinburg stated that a party challenging a district judge's exercise of discretion "can prevail only if there was no reasonable basis for [its] decision." *Id.* (quoting *SEC v. Bausch & Lomb, Inc.*, 565 F.2d 8, 18 (2d Cir. 1977)).

²⁹ *Euromepa*, 51 F.3d at 1098.

rule.³⁰ The Second Circuit also stated that the district court gave too much weight to the fact that the information requested would not have been discoverable in France.³¹ The heart of the opinion, however, concerned whether and to what extent the district court should inquire into the foreign nation's procedural and substantive law in order to determine if discovery assistance would offend the foreign tribunal.³²

According to the Second Circuit, district courts should not conduct an "extensive investigation" in order to determine the "attitudes of foreign nations to outside discovery assistance."³³ Rather, the district court should consider only "authoritative proof that the foreign tribunal would reject evidence obtained with the aid of section 1782."³⁴ This authoritative proof could be found in the forum's "judicial, executive, or legislative declarations that specifically address the use of evidence gathered under foreign proceedings."³⁵ If there is no such declaration, then the district court should consider the discovery request in light of the goal of providing efficient assistance to foreign tribunals and litigants.³⁶ In *Application of Euromepa*, the district court considered the French rules of procedure, and attempted to gain a general understanding of the French attitude toward discovery conducted in France.³⁷ There was no authoritative proof, as defined by the Second Circuit, so the district court's determination that discovery under section 1782 would offend the people of France was unwarranted.³⁸

The Second Circuit concluded the opinion by stating that the district court should remedy any concerns it has by issuing a "closely tailored discovery order, rather than denying relief outright."³⁹ The Second Circuit reasoned that the district court could force litigants to submit all evidence gathered under section 1782 to the foreign judiciary, in order to maintain the balance between the litigants created by the French system of discovery.⁴⁰ The district courts also could address problems of reciprocity by forcing parties to exchange

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 1099.

³³ *Id.*

³⁴ *Id.* at 1100.

³⁵ *Id.*

³⁶ *Id.* (citing Senate Report, *supra* note 3, at 3783).

³⁷ *In re Application of Euromepa*, 155 F.R.D. 80, 82-83 (S.D.N.Y. 1994).

³⁸ *Euromepa*, 51 F.3d at 1101.

³⁹ *Id.*

⁴⁰ *Id.* at 1102. In the French system, if a party requests discovery of evidence, then the evidence must be introduced at the trial, whether or not it benefited the party's case. *Id.* This is why the majority suggests that the district court use the power of the discovery order to force the evidence gathered under section 1782 to be submitted to the French court. *Id.* The dissent harshly criticized this suggestion, claiming that it simply forces a deluge of unwanted information on the French court. *Id.* at 1103 (Jacobs, J., dissenting).

information as a condition for granting discovery under section 1782.⁴¹

Judge Jacobs, writing in dissent, stated that the majority's opinion removes too much of the district court's discretion that the statute was designed to give.⁴² Judge Jacobs argued that discoverability was a "useful tool," and rejected the majority's holding that its use was quite limited.⁴³ According to the dissent, the district court should be allowed to look into the nature and attitudes of the forum because the purpose of the statute is to aid foreign tribunals, not to allow evasion of their procedures.⁴⁴ Judge Jacobs argued that the majority removed too much of the district court's discretion by requiring authoritative proof that the forum would reject the evidence before the petition can be denied.⁴⁵ The dissent also criticized the requirement that the district court issue a closely tailored discovery order instead of denying relief because it simply imported the entire discovery process to the United States.⁴⁶

III. Background Law

In 1855, Congress enacted the first statute pertaining to discovery for use in foreign proceedings, but this statute was "lost" and federal courts never used it to aid foreign litigation.⁴⁷ In 1865, Congress passed another statute which allowed courts to compel testimony in response to letters rogatory, but this statute was so limited that no federal court provided discovery assistance to a foreign country pursuant to this statute.⁴⁸ In 1948 and 1949 Congress passed 28 U.S.C. section 1782, which allowed federal district courts to administer depositions for use in foreign judicial proceedings.⁴⁹

In 1964, Congress completely revised 28 U.S.C. section 1782 in order to create a procedure that would provide for "wide judicial

⁴¹ *Id.* at 1102. The district court was extremely concerned that the foreign party would get much broader discovery under section 1782 than the American party would be able to obtain abroad. The Second Circuit insisted that rather than denying relief outright, district courts should oversee the exchange of information between the parties. *Id.*

⁴² *Id.* (Jacobs, J., dissenting).

⁴³ *Id.* at 1103 (Jacobs, J., dissenting).

⁴⁴ *Id.* at 1103-1104 (Jacobs, J., dissenting).

⁴⁵ *Id.* at 1103 (Jacobs, J., dissenting).

⁴⁶ *Id.* at 1104-1105 (Jacobs, J., dissenting). Judge Jacobs argued that the focus should be on aiding the foreign tribunal's discovery, not taking over the entire discovery procedure. *Id.*

⁴⁷ Stahr, *supra* note 1, at 601.

⁴⁸ *Id.* The statute only allowed the federal courts to provide assistance if "(i) the United States and the foreign country were at peace, (ii) the foreign government was a party to or had an 'interest' in the case, and (iii) the case was 'for recovery of money or property.'" *Id.* (quoting Act of March 3, 1863, ch. 95, § 1, 12 Stat. 769).

⁴⁹ Stahr, *supra* note 1, at 603.

assistance . . . on a wholly unilateral basis"⁵⁰ to foreign tribunals and litigants involved in international litigation. The statute provides in relevant part:

The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a . . . request made by a foreign or international tribunal or upon the application of any interested person . . .⁵¹

One of the major changes in the statute was allowing "any interested person" to apply for discovery in the United States. Prior to the adoption of the 1964 amendments, only foreign judiciaries could obtain such assistance.⁵² The amended statute also provides that unless the district court specifies otherwise, the discovery is to be conducted in accordance with the Federal Rules of Civil Procedure.⁵³

The legislative history states that after the amendments were enacted, section 1782 was intended to provide "equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects."⁵⁴ Congress also hoped that by providing such assistance, other countries would adopt similar provisions for the benefit of U.S. tribunals and litigants.⁵⁵ The Senate Judiciary Committee's report states that the amendments were needed to "render procedures in the U.S. more efficient, more effective, and more economical."⁵⁶ In furtherance of these principles, the statute was intended to give district courts wide discretion in deciding whether to grant discovery requests.⁵⁷ However, appellate courts have limited this discretion by determining what factors can be relied on when considering whether to grant a section 1782 petition for discovery assistance.⁵⁸ These factors have included admissibility, reciprocity, and discoverability.⁵⁹

⁵⁰ *Id.* at 604 (quoting Phillip W. Amram, *Public Law No. 88-619 of October 3, 1964 - New Developments in International Judicial Assistance in the United States of America*, 32 D.C. BAR J. 24, 28 (1965)).

⁵¹ 28 U.S.C. § 1782(a) (1988).

⁵² *See Stahr, supra* note 1, at 597 (quoting Hans Smit, *Recent Developments in International Litigation*, 35 S. TEX. L.J. 215 (1994)).

⁵³ *Id.* However, courts are given "complete discretion in prescribing the procedure to be followed." Senate Report, *supra* note 3, at 3783.

⁵⁴ Senate Report, *supra* note 3, at 3783.

⁵⁵ *Id.*

⁵⁶ *Id.* at 3792.

⁵⁷ *Lo Ka Chun v. Lo To*, 858 F.2d 1564, 1565 (11th Cir. 1988) (stating that "Congress has given the district courts such broad discretion in granting judicial assistance to foreign countries").

⁵⁸ There has been much criticism of the courts' interpretation of section 1782, often characterized as "reluctance in giving full effect to these policies." *See Smit, supra* note 4, at 229.

⁵⁹ *See John Deere Ltd. v. Sperry Corp.*, 754 F.2d 132, 134 (3rd. Cir. 1985) (holding that a showing that the evidence sought was admissible in a foreign proceeding was not required

In *John Deere Ltd. v. Sperry Corp.*,⁶⁰ the Third Circuit considered what restraints might be placed on persons interested in foreign litigation seeking discovery under section 1782.⁶¹ Specifically at issue was the district court's holding that because Canadian law precluded the use of letters rogatory and the evidence sought would not be admissible in Canadian courts, the section 1782 petition should be denied.⁶² The district court also concluded that granting discovery would not enhance reciprocal discovery for United States litigants in Canada.⁶³ The Third Circuit held that section 1782 was intended to provide broad assistance, but that it did not ignore "considerations of comity and sovereignty that pervade international law."⁶⁴ The Third Circuit acknowledged that relief should not be granted under section 1782 if the discovery order "trenched on the clearly established procedures of a foreign tribunal."⁶⁵ Although section 1782 was intended to inspire other jurisdictions to reciprocate, the Third Circuit held that reciprocity was not a requirement or a predicate to a grant of discovery.⁶⁶

In *John Deere*, the Third Circuit also stated that when an interested person is seeking discovery under section 1782, the district court should consider whether foreign discovery procedures are being circumvented by application to U.S. courts.⁶⁷ However, in that case, the information sought was generally discoverable in Canada, and the Third Circuit instructed the district court not to make a more extensive inquiry.⁶⁸ Finally, the Third Circuit concluded that district courts are not required to predict the admissibility of the evidence sought to be discovered.⁶⁹

and holding that the foreign jurisdiction need not provide reciprocal discovery assistance); *In re Application of Silvia Gianoli Aldunate*, 3 F.3d 54, 58 (2d Cir. 1993) (holding that evidence need not be discoverable in the foreign court in order for the district court to grant a section 1782 petition). *But see Lo Ka Chun*, 858 F.2d at 1566 (holding that evidence sought under section 1782 must be discoverable in the foreign jurisdiction).

⁶⁰ 754 F.2d 132 (3rd Cir. 1985).

⁶¹ *Id.* at 135.

⁶² *Id.* A letter rogatory, sometimes called a letter of request, is a "letter from one court to another seeking official assistance." Stahr, *supra* note 1, at 600 n.12 (citing *The Signe*, 37 F. Supp 819, 820 (D. La. 1941)).

⁶³ *John Deere*, 754 F.2d at 135.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* The court felt that, although reciprocity could inform a district court's decision, the evidence was discoverable in the foreign jurisdiction, and therefore reciprocity was not a concern in this case. *Id.* at 138.

⁶⁷ *Id.* at 136; *see Selas Corp. of Am. v. Elec. Furnace Co.*, 88 F.R.D. 75, 77 (E.D. Pa. 1980) (denying discovery request when it was doubtful whether evidence sought would be discoverable in foreign jurisdiction).

⁶⁸ *John Deere*, 754 F.2d at 136.

⁶⁹ *Id.*; *see also Shin v. United States*, 555 F.2d 720, 723 (9th Cir. 1977); *In re Letters Rogatory from the Tokyo District, Tokyo, Japan*, 539 F.2d 1216, 1219 (9th Cir. 1976). The court in *John Deere* argued that the Canadian court would have to decide "the use to which

In *In re Application of Malev Hungarian Airlines*,⁷⁰ the Second Circuit considered a Hungarian Airline company's application for discovery under section 1782.⁷¹ Malev Hungarian Airlines petitioned the district court for discovery of United Technologies, an American company that had sued Malev in Hungary for specific enforcement of certain sales contracts.⁷² In denying the discovery request, the district court concluded that Malev should have first sought discovery in Hungary,⁷³ that only foreign tribunals could seek discovery under section 1782,⁷⁴ and that, if it granted the discovery request, there would not be reciprocal discovery for the American plaintiff in Hungary.⁷⁵ The Second Circuit reversed, holding that the district court relied on improper factors.⁷⁶

The majority in *Malev* rejected the district court's assertion that Malev should first have sought discovery in the Hungarian court.⁷⁷ They found nothing in the statute that would support "a quasi-exhaustion requirement of the sort imposed by the district court."⁷⁸ The Second Circuit also found that such a quasi-exhaustion rule was at odds with the twin aims of the statute – providing efficient assistance to foreign tribunals and encouraging other countries to adopt similar procedures.⁷⁹ It added an additional burden on litigants, even though the goal of the statute was to provide more efficient assistance.⁸⁰ The Second Circuit found that requiring interested persons first to apply to the forum court would not encourage other courts to follow the United States' generous example.⁸¹ The Second Circuit also rejected the district court's statement that only foreign tribunals could request discovery assistance, because it believed the plain language of the statute indicates that interested persons may seek

such evidence [was] put," and as long as the evidence was "for use in a foreign proceeding which comports with notions of due process," the district court should grant the section 1782 petition. *John Deere*, 754 F.2d at 138.

⁷⁰ 964 F.2d 97 (2d Cir. 1992), *cert. denied*, 113 S.Ct. 179 (1992).

⁷¹ *Malev Hungarian Airlines*, 964 F.2d at 98.

⁷² *Id.*

⁷³ *Id.* at 100.

⁷⁴ *Id.* at 101.

⁷⁵ *Id.* The district court was also extremely concerned about the additional burden that would be placed on the U.S. district courts when presiding over section 1782 discovery proceedings. *Id.* The majority of the Second Circuit rejected this as a basis for denying the petition, stating that the district court could address this concern by imposing specific conditions in the discovery order. *Id.* at 100 (citing Senate Report, *supra* note 3, at 3792-94).

⁷⁶ *Id.* at 98.

⁷⁷ *Id.* at 100.

⁷⁸ *Id.* The majority also relied on *John Deere*, 754 F.2d 132 (3d Cir. 1985), where the Third Circuit approved a discovery petition from a private litigant when they had not first sought discovery in Canada. See *supra* notes 60-69 and accompanying text.

⁷⁹ *Malev Hungarian Airlines*, 964 F.2d at 100; see also Senate Report, *supra* note 3, at 3792-94.

⁸⁰ *Malev Hungarian Airlines*, 964 F.2d at 100.

⁸¹ *Id.*

discovery under section 1782.⁸² Finally, the majority in *Malev* rejected the district court's reliance on the lack of reciprocity, holding that section 1782 is "a one-way street" that grants broad assistance to other forums, but "demands nothing in return."⁸³

Judge Feinburg, in his dissent, criticized the majority's opinion, claiming that it would turn U.S. courts into "global Special Masters for Discovery."⁸⁴ Judge Feinburg argued that section 1782 should be read to provide assistance when the information is "necessary to foreign litigation but beyond the power of the foreign court."⁸⁵ Since the party against whom discovery was sought was the plaintiff in the Hungarian litigation, that party would be completely bound by an order of the Hungarian court.⁸⁶ Therefore, according to the dissent, granting the discovery order only served to circumvent Hungary's discovery proceeding.⁸⁷ The dissent also argued that when the district court was responsible for supervising protracted discovery it should be able to consider whether the forum would allow reciprocal discovery.⁸⁸

In *In re Application of Asta Medica*⁸⁹ the First Circuit held that discoverability was a threshold requirement that had to be met before a petition under section 1782 would be granted.⁹⁰ The district court in that case granted the petition for discovery, rejecting the discoverability argument.⁹¹ The First Circuit was concerned that a U.S. litigant in a foreign tribunal would be at a "substantial disadvantage" if foreign litigants could obtain liberal U.S.-style discovery, but American litigants could not.⁹² The First Circuit was also concerned about foreign litigants using section 1782 "to circumvent foreign law and procedures."⁹³ The court found that, without the discoverability requirement, foreign countries might be offended by the United States

⁸² *Id.* at 101.

⁸³ *Id.* (quoting Phillip W. Amram, *The Proposed International Convention on the Service of Documents Abroad*, 51 A.B.A.J. 650, 651 (1965)). Thus, the district court could grant Malev's petition without also accepting responsibility for the other party's discovery. *Id.* at 101-102.

⁸⁴ *Id.* at 103 (Feinburg, J., dissenting).

⁸⁵ *Id.* at 105 (Feinburg, J., dissenting). The dissent argued that the district court did not mechanically require exhaustion, but that Malev had failed to show any need for section 1782 assistance. *Id.* (Feinburg, J., dissenting).

⁸⁶ *Id.* at 105 (Feinburg, J., dissenting).

⁸⁷ *Id.* at 105 (Feinburg, J., dissenting). The dissent maintained that section 1782 was intended to allow efficient assistance in seeking limited amounts of evidence, i.e. bank records that were beyond the power of the foreign court. Malev's petition for discovery was viewed by Judge Feinburg as totally replacing the Hungarian discovery system with U.S.-style discovery – something that the statute was not designed to permit. *Id.* at 105-106 (Feinburg, J., dissenting).

⁸⁸ *Id.* at 105 (Feinburg, J., dissenting).

⁸⁹ 981 F.2d 1 (1st Cir. 1992).

⁹⁰ *Application of Asta Medica*, 981 F.2d at 7.

⁹¹ *In re Application of Asta Medica*, 794 F. Supp. 442, 443 (D. Me. 1992).

⁹² *Application of Asta Medica*, 981 F.2d at 5.

⁹³ *Id.* at 6.

granting discovery for use in their jurisdiction in contravention of their laws.⁹⁴ The First Circuit stated that section 1782 was not intended to provide litigants with the opportunity to "side-step" a foreign country's law prohibiting the use of certain information by "rushing here and obtaining the information under section 1782."⁹⁵ The court found that this would defeat one of the purposes of the statute, which was to encourage foreign nations to adopt provisions similar to section 1782.⁹⁶

In *In re Application of Silvia Gianoli Aldunate*,⁹⁷ the district court granted a petition for discovery pursuant to section 1782 for use in a Chilean incompetency proceeding.⁹⁸ The defendant appealed, claiming that the plaintiff failed to make the required threshold showing that the discovery would have been available in the foreign jurisdiction.⁹⁹ The Second Circuit considered the text of section 1782 and found three requirements: (1) that the person against whom discovery was sought reside in the United States; (2) that the discovery be for use in a foreign proceeding; and (3) that the applicant be a foreign or international tribunal or interested person.¹⁰⁰ The Second Circuit found that these requirements were met, and that there was nothing in the text that implied a discoverability requirement.¹⁰¹ The Second Circuit rejected other circuits' recognition of a discoverability requirement,¹⁰² but stated that discoverability was a "useful tool" in the district court's exercise of discretion under section 1782.¹⁰³ *Gianoli* echoed the holding in *Malev*, that the twin aims of section 1782, as expressed in the legislative history, must inform a determination of whether to grant discovery.¹⁰⁴ After making an inquiry into the laws of the forum, the district court found that a grant of discovery would not circumvent Chilean procedure, nor offend Chile's sovereignty.¹⁰⁵ The Second Circuit held that this inquiry was

⁹⁴ *Id.* at 7.

⁹⁵ *Id.* at 6.

⁹⁶ *Id.* at 7.

⁹⁷ 3 F.3d 54 (2d Cir. 1993).

⁹⁸ *Id.* at 55. The Chilean court had ordered the parties to conduct a complete inventory of all of the potential incompetents' assets, and the discovery sought under section 1782 pertained to assets which were located in the United States. *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 58-59; see 28 U.S.C. § 1782(a) (1988).

¹⁰¹ *Gianoli*, 3 F.3d at 59.

¹⁰² *Id.*; see *supra* notes 67-69 and accompanying text.

¹⁰³ *Gianoli*, 3 F.3d at 60.

¹⁰⁴ *Id.* at 61 (quoting *In re Application of Malev Hungarian Airlines*, 964 F.2d 97, 100 (2d Cir. 1992)).

¹⁰⁵ *Id.* The district court found that "litigants in Chile are not prohibited from gathering evidence through methods that are lawful in the place where those methods are undertaken." *Id.* Combined with the fact that granting the section 1782 petition would help the Chilean court compile "a complete inventory" of the incompetent's assets, these factors indicated that neither Chilean sovereignty nor the Chilean court would be offended by

sufficient to satisfy the twin aims, and therefore the district court did not abuse its discretion.¹⁰⁶

IV. Significance of the Case

Judge Calabresi, writing for the majority, began the opinion in *Euromepa* by reaffirming the principle that district courts are to "evaluate discovery requests under section 1782 in light of the statute's 'twin aims.'"¹⁰⁷ The majority held that the district court's analysis "runs counter to the principles set forth in *Malev*, *Aldunate*, *John Deere*, *Ltd.*, and, we believe, in the statute itself."¹⁰⁸

The court first took issue with the district court's statement that *Euromepa* "failed to even attempt to use the mechanism provided by French procedure for obtaining documents."¹⁰⁹ The Second Circuit viewed this as a "quasi-exhaustion" requirement of the type that was expressly rejected by the Second Circuit in *Malev*.¹¹⁰ Although it did not expressly state this, the Second Circuit appears to have taken the *Malev* holding to an extreme. In *Malev*, the Second Circuit rejected the district court's conclusion that the section 1782 petition was premature and unnecessary because application had not first been made to the forum court.¹¹¹ In *Euromepa*, the Second Circuit rejected the district court's statement that it considered *Euromepa*'s failure to apply to the French court relevant only to a determination of the "nature and attitudes" of the French government toward discovery.¹¹² The *Euromepa* decision marks a definite shift from the *Malev* holding that district courts cannot predicate the denial of a section 1782 petition on the failure to apply to the forum court for discovery.¹¹³ *Euromepa* directs the district court to not consider the circumstances surrounding the petitioner's application.¹¹⁴

The *Euromepa* court also found the district court's inquiry into the nature and attitudes to be a test to determine if the evidence would be

section 1782 discovery. *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1097 (2d Cir. 1995) (citing *In re Application of Malev Hungarian Airlines* 964 F.2d 97, 100 (2d Cir. 1992), *cert. denied*, 113 S.Ct. 179 (1992)).

¹⁰⁸ *Euromepa*, 51 F.3d at 1098.

¹⁰⁹ *Id.* (quoting *In re Application of Euromepa*, 155 F.R.D. 80, 83 (S.D.N.Y. 1994)).

¹¹⁰ *Euromepa*, 51 F.3d at 1097 (citing *Application of Malev Hungarian Airlines*, 964 F.2d at 100).

¹¹¹ *Malev Hungarian Airlines*, 964 F.2d at 100.

¹¹² *Euromepa*, 51 F.3d at 1098 (quoting *Application of Euromepa*, 155 F.R.D. at 83).

¹¹³ *Euromepa*, 51 F.3d at 1098; *Malev Hungarian Airlines*, 964 F.2d at 101.

¹¹⁴ *Euromepa*, 51 F.3d at 1098. The dissent argued that the legislative history specifically charged the district court to make an inquiry into the nature and attitudes of the forum, and that district courts should consider all relevant information when making such a determination. *Id.* at 1103 (Jacobs, J., dissenting).

discoverable in France.¹¹⁵ The Second Circuit stated that the discoverability of the evidence was of "quite limited" relevance to the evaluation of a petition under section 1782,¹¹⁶ and, when coupled with the "impermissible factor" of quasi-exhaustion, it did not constitute grounds for denying the petition.¹¹⁷ The dissent criticized the majority's imposition of the "quite limited relevance" standard for discoverability.¹¹⁸ The court in *Gianoli* had held that, although discoverability was not a prerequisite for granting a section 1782 request,¹¹⁹ it was a "'useful tool' for the district judge in exercising discretion."¹²⁰ Without explanation, the *Euromepa* court severely limited the impact of *Gianoli* as it pertained to the discoverability of the evidence.¹²¹

The district court's approach in *Application of Euromepa* attempted to strike a balance between the "twin aims" of section 1782.¹²² It did not attempt to set up rigorous tests for granting a request for discovery, rather it considered all the evidence available before exercising discretion in granting the petition.¹²³ One issue that the majority of the Second Circuit dismissed was the suggestion that section 1782 is designed to render assistance, but not to allow United States courts to completely take over discovery in a foreign proceeding.¹²⁴ Judge Feinburg, dissenting in *Malev*, wrote that section 1782 had been traditionally used "to seek limited amounts of evidence (commonly bank records) from third parties in this country not subject to the jurisdiction of the foreign court."¹²⁵ *Euromepa* was seeking "broad gauge, category by category, American-style discovery."¹²⁶ The dissent argued that it was reasonable for the district court to consider the availability of French procedures when exercising its discretion to deny the section 1782 petition.¹²⁷

In addition, the district court relied on the need to prevent

¹¹⁵ *Id.* at 1098.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 1103 (Jacobs, J., dissenting).

¹¹⁹ *Id.* (Jacobs, J., dissenting). But see *In re Application of Asta Medica*, 981 F.2d 1, 7 (1st Cir. 1992); *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988); *Lo Ka Chun v. Lo To*, 858 F.2d 1564, 1566 (11th Cir. 1988).

¹²⁰ *Euromepa*, 51 F.3d at 1103. (Jacobs, J., dissenting) (citing *In re Application of Gianoli*, 3 F.3d 54, 60 (2d Cir. 1993)).

¹²¹ *Id.* at 1098.

¹²² *In re Application of Euromepa, S.A.*, 155 F.R.D. 80, 82 (S.D.N.Y. 1994).

¹²³ *Id.*

¹²⁴ The majority considered any reference to an available "mechanism" for discovery in the foreign country to be a quasi-exhaustion requirement. *Euromepa*, 51 F.3d at 1098.

¹²⁵ *In re Application of Malev Hungarian Airlines*, 964 F.2d 97, 105 (2d Cir. 1992) (Feinburg, J., dissenting), cert. denied, 113 S.Ct. 179 (1992).

¹²⁶ *Euromepa*, 51 F.3d at 1103 (Jacobs, J., dissenting).

¹²⁷ *Id.* (Jacobs, J., dissenting).

circumvention of foreign discovery procedures, a valid policy concern recognized in *Gianoli*.¹²⁸ The district court's consideration of the fact that Euromepa was seeking to use American discovery "as a substitute for discovery in France rather than as an aid and supplement to the procedures of a French tribunal" was an application of the *Gianoli* test.¹²⁹ In *Euromepa*, the majority recognized that the district court was attempting to inquire about whether "granting this petition would be an unwarranted intrusion into France's system of evidence gathering."¹³⁰ In *Gianoli*, the Second Circuit approved the discovery order because the district court "clearly made an inquiry into whether its grant of discovery . . . would circumvent Chilean restrictions on discovery and whether its grant of discovery would be an affront to the Chilean court or to Chilean sovereignty."¹³¹ The court in *Euromepa* considered the issue left unresolved in *Gianoli*—the "appropriate scope of this 'inquiry' into the likelihood that providing section 1782 assistance to foreign litigants will offend a foreign tribunal."¹³²

The Second Circuit stated that "an extensive examination of foreign law regarding the existence and extent of discovery in the forum country was not desirable."¹³³ The court relied on a law review article which stated that the drafters believed that it would be "wholly inappropriate for an American district court to try to obtain [a broad understanding of the subtleties of the application of the foreign system] for the purpose of honoring a simple request for assistance."¹³⁴

This passage was a justification for granting section 1782 requests when the production of the evidence could not be compelled under foreign law. However, the majority quoted this language as supporting a limited inquiry into the "existence and extent of discovery" in the foreign nation.¹³⁵ The issue that the district court considered in this case was not whether the evidence could be "compelled" by the foreign jurisdiction, but whether the nature and attitudes of the foreign nation would be adverse to the grant of discovery.¹³⁶ When production of

¹²⁸ *In re Application of Euromepa*, 155 F.R.D. 80, 82 (S.D.N.Y. 1994) (quoting *In re Application of Gianoli* 3 F.3d 54, 60 (2d Cir. 1993)). The court in *Gianoli* held that avoiding circumvention of foreign restrictions on discovery was a legitimate policy concern, and that it should be addressed by the district court's exercise of discretion. *Gianoli*, 3 F.3d at 60.

¹²⁹ *Euromepa*, 51 F.3d at 1103 (Jacobs, J., dissenting).

¹³⁰ 51 F.3d at 1098 (quoting *In re Application of Euromepa*, 155 F.R.D. 80, 84 n.2 (S.D.N.Y. 1994)).

¹³¹ *Gianoli*, 3 F.3d at 61.

¹³² *Euromepa*, 51 F.3d at 1099. The majority does not include inquiries into whether a grant of discovery under section 1782 would circumvent the foreign country's restrictions on discovery in its formulation of the issue presented in this case. *Id.*

¹³³ *Id.*

¹³⁴ *Id.* (quoting Smit, *supra* note 4, at 235). Smit also argues that the drafters believed countries which did not have American-style discovery would still welcome the assistance of the American judicial system. Smit, *supra* note 4, at 235.

¹³⁵ *Euromepa*, 51 F.3d at 1099.

¹³⁶ *In re Application of Euromepa*, 155 F.R.D. 80, 82 (S.D.N.Y. 1994).

evidence cannot be compelled by the foreign court because the party or evidence is found in the United States, then there is a stronger case for not making an extensive inquiry into the nature and attitudes of the foreign country.¹³⁷ The limited inquiry permitted in *Euromepa* does not allow consideration of the fact that the evidence sought by Euromepa was quite vast and that the French discovery system permitted very little pre-trial discovery.¹³⁸

The majority in *Euromepa* looked to the Third Circuit's opinion in *John Deere v. Sperry* for additional support for the limited inquiry into foreign law.¹³⁹ In *John Deere*, the Third Circuit held that the legislative history concerning the inquiry into the nature and attitudes of the forum country "authorized district courts to scrutinize the underlying fairness of the foreign proceedings to insure that they comply with notions of due process."¹⁴⁰ The court stated that it was "doubtful" that the statute imposed a requirement that the district courts "predict or construe the procedural or substantive law of the foreign jurisdiction."¹⁴¹ In *Euromepa*, the majority approved of the Third Circuit's explanation that "to require a district court to undertake more extensive inquiry into the laws of the foreign jurisdiction would seem to exceed the proper scope of section 1782."¹⁴²

The majority opinion did not consider the context of the *John Deere* quote when it used it as authority for requiring a limited inquiry.¹⁴³ The Third Circuit stated that a "more extensive inquiry" would be beyond the scope of section 1782,¹⁴⁴ but the court in *Euromepa* did not discuss the level of inquiry that the *John Deere* court supported. In *John Deere*, the court stated that it did not "countenance the use of U.S. discovery to evade the limitations placed on domestic pre-trial disclosure by foreign tribunals."¹⁴⁵ The Third Circuit further stated that concern about circumvention of foreign discovery procedures by American courts' granting of discovery orders was "particularly pronounced" when an individual litigant made the request for

¹³⁷ See *In re Application of Malev Hungarian Airlines*, 964 F.2d 97, 105 (2d Cir. 1992) (Feinburg, J., dissenting), *cert. denied*, 113 S.Ct. 179 (1992). This is precisely the situation that Judge Feinburg believed would justify invocation of section 1782, because the party seeking discovery could not obtain the assistance of the foreign court. *Id.* (Feinburg, J., dissenting).

¹³⁸ See *Euromepa*, 51 F.3d at 1104 (Jacobs, J., dissenting). Judge Jacobs argues that the Second Circuit in *Gianoli* held that the foreign nation's attitude toward discovery was "appropriate and useful." *Id.* (Jacobs, J., dissenting) (citing *In re Application of Gianoli*, 3 F.3d 54, 60-61 (2d Cir. 1993)).

¹³⁹ *Euromepa*, 51 F.3d at 1099.

¹⁴⁰ *John Deere, Ltd. v. Sperry*, 754 F.2d 132, 136, n.3 (3d Cir. 1985).

¹⁴¹ *Id.* It is important to note that the district court did not attempt to predict or construe foreign law, rather it simply informed itself of the basic discovery procedures available in France. See *supra* notes 62-64 and accompanying text.

¹⁴² *Euromepa*, 51 F.3d at 1099 (quoting *John Deere*, 754 F.2d at 136).

¹⁴³ *Id.*

¹⁴⁴ *John Deere*, 754 F.2d at 136.

¹⁴⁵ *Id.*

assistance.¹⁴⁶ Thus, in *John Deere*, the court felt that an inquiry that considered more than whether the granting of discovery might circumvent the foreign countries' discovery procedures would not be countenanced by section 1782.¹⁴⁷ The *Euromepa* court did not consider the circumvention issue, and stated that district courts should not attempt to "glean the accepted practices and attitudes of foreign nations."¹⁴⁸ This decision, while it accepts the analysis used in *John Deere*, fails to recognize that some understanding of the foreign country's discovery procedures is necessary in order to satisfy the inquiry required in *John Deere*.¹⁴⁹

The *Euromepa* court recognized the principle that "[a] grant of discovery that trenched upon the *clearly established* procedures of a foreign tribunal would not be within section 1782."¹⁵⁰ The court defined "clearly established" by holding that the "district court's inquiry into the discoverability of the requested materials should consider only authoritative proof that a foreign tribunal would reject evidence obtained with the aid of section 1782."¹⁵¹ The court stated that authoritative proof would be "embodied in a forum country's judicial, executive, or legislative declarations that specifically address the use of evidence gathered under foreign proceedings."¹⁵² If there is not authoritative proof, then the interest in providing efficient assistance to foreign tribunals should inform the district court's opinion.¹⁵³

The Second Circuit did not rely on prior case law when it created the "authoritative proof" test.¹⁵⁴ However, the court framed the issue referring to the "inquiry" into the nature and attitudes of the foreign tribunal that was conducted in *Gianoli*.¹⁵⁵ In *Gianoli*, the Second Circuit approved of the district court's inquiry into Chilean discovery procedures.¹⁵⁶ Specifically, the Second Circuit approved of the district court's determination that Chilean law prohibits litigants "from gathering evidence through methods that are lawful in the place where

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Euromepa*, 51 F.3d at 1099.

¹⁴⁹ See *John Deere*, 754 F.2d at 135.

¹⁵⁰ *Euromepa*, 51 F.3d at 1099 (quoting *John Deere*, 754 F.2d at 135).

¹⁵¹ *Euromepa*, 51 F.3d at 1100.

¹⁵² *Id.* The opinion cites *South Carolina Insurance Co. v. Assurantie Maatschappij "De Zeven Provinciën" N.V.*, 1987 App. Cas. 24 (H.L.(E). 1987) as an example of an authoritative statement. *Id.* In this case, the British House of Lords stated that discovery under section 1782 was not so oppressive as to justify an injunction by the lower court. *Maatschappij*, 1987 App. Cas. at 45.

¹⁵³ *Euromepa*, 51 F.3d at 1100.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 1098-99.

¹⁵⁶ *In re Application of Gianoli*, 3 F.3d 54, 62 (2d Cir. 1993).

those methods are undertaken."¹⁵⁷ The *Euromepa* court's authoritative proof test is not consistent with the inquiry that was specifically approved by the Second Circuit in *Gianoli*. The district court in *Gianoli* made a calculated inquiry into Chilean discovery, faithfully attempting to determine if a grant of discovery would circumvent Chilean law or offend the people of Chile.¹⁵⁸ The *Euromepa* decision, however, does not follow the reasoning of *Gianoli*, so district courts must now confine their inquiries to only "authoritative proof" that the forum would reject the assistance of the U.S. court.¹⁵⁹

The dissent criticized the authoritative proof requirement because it does not avoid the "entanglement of American courts into the subtleties of foreign law."¹⁶⁰ Judge Jacobs reasoned that it would not be easy for American courts to determine if foreign declarations are authoritative and "whether they authoritatively dispose of a particular petition for discovery."¹⁶¹ The majority's opinion offered some support for this conclusion when it stated that a district judge faced with an authoritative declaration "would still have to compare the facts of the case then currently before the court to the foreign precedent cited by the party opposing the section 1782 discovery and determine whether the two contexts are sufficiently analogous to warrant a denial of discovery."¹⁶² After limiting the scope of the district court's inquiry to a consideration of only authoritative proof, *Euromepa* then required the district court to do something that it earlier stated was beyond the scope of section 1782 – to "construe the procedural or substantive law of the foreign jurisdiction."¹⁶³

Because the district court did not rely on authoritative declarations, the Second Circuit rejected its conclusion that a grant of discovery would offend the people of France.¹⁶⁴ The Second Circuit concluded that district judges should not place much weight on the sovereignty interest of the forum nation.¹⁶⁵ When explaining this assertion, the court stated that the French court could protect itself by issuing an injunction to stop discovery, or by excluding the evidence gathered in foreign discovery proceedings.¹⁶⁶ The court added that if the forum nation was offended, then it would inspire the authorita-

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Euromepa*, 51 F.3d at 1100. It is possible that the Second Circuit could distinguish *Gianoli* by deciding that the district court's determination that Chile would accept U.S. assistance was based on "authoritative proof."

¹⁶⁰ *Id.* at 1104 (Jacobs, J., dissenting).

¹⁶¹ *Id.* (Jacobs, J., dissenting).

¹⁶² *Id.* at 1100 n.4.

¹⁶³ *Id.* at 1099 (quoting *John Deere, Ltd. v. Sperry*, 754 F.2d 132, 136 n.3 (3d Cir. 1985)).

¹⁶⁴ *Id.* at 1101.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

tive declarations that district judges could use to avoid additional offense in the future.¹⁶⁷

This reasoning is not consistent with the "considerations of comity and sovereignty that pervade international law" specifically embodied in section 1782.¹⁶⁸ The Second Circuit's decision ignores these fundamental principles, and instead challenges other countries to prove that they do not want the assistance of United States district courts. In addition, the Second Circuit suggested that district courts would benefit from the guidance provided by an offended tribunal's authoritative declaration that it will not accept the discovery provided by section 1782.¹⁶⁹ In this way, the Second Circuit requires district courts to conduct the analysis backwards: only after the forum has been offended will the principle of sovereignty be afforded any consideration when deciding a section 1782 petition.

The majority concluded its opinion by offering guidance on the process the district court should use in addressing concerns about granting the discovery order. The Second Circuit stated that the district judge should exercise his discretion by "issuing a closely tailored discovery order rather than by denying relief outright."¹⁷⁰ Thus, the district judge could solve the problems that might arise if the forum does not have reciprocal discovery procedures by requiring the parties to exchange information.¹⁷¹ The dissent argued that this formulation "effectively limits the district court's statutory discretion to the crafting of discovery orders rather than the denial of relief outright."¹⁷²

V. Conclusion

The legislative history states that the purpose of section 1782 is to provide efficient discovery assistance to foreign jurisdictions and to influence them to adopt similar provisions,¹⁷³ but it also states that a district court should look into the nature and attitudes of the foreign nation in order that the grant of discovery not offend the forum.¹⁷⁴ Courts have attempted to harmonize these two competing interests, and to create meaningful standards to guide district courts' discretion when reviewing petitions under section 1782.

The majority in *Euromepa* greatly reduces the importance of the nature and attitudes of the forum, and instead focuses on the stated

¹⁶⁷ *Id.*

¹⁶⁸ *John Deere, Ltd. v. Sperry*, 754 F.2d 132, 135 (3d Cir. 1985).

¹⁶⁹ *Euromepa*, 51 F.3d at 1101.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 1102.

¹⁷² *Id.* at 1102 (Jacobs, J., dissenting).

¹⁷³ Senate Report, *supra* note 3, at 3792-94.

¹⁷⁴ *Id.*

purpose of providing efficient assistance. After the holding in *Euromepa*, only authoritative proof that the forum would reject the discovery assistance will allow the district court to reject a petition. The dissent focuses more on the interest of the forum, and seems to put these two competing interests on equal footing. This balance is accomplished by allowing the district court complete discretion in deciding which of these interests should be given greater weight according to the specific facts of the case.

The dissent's argument is much more consistent with Second Circuit precedent. The *Euromepa* decision represents a substantial limitation on the discretion of the district court. Such a denial of discretion is contrary to the holding in *Gianoli*, that concerns about discoverability should be addressed by the exercise of the district courts' discretion.¹⁷⁵ The district court analyzed *Euromepa*'s petition with an eye toward all the circumstances surrounding the application. The district court did not deny the petition because *Euromepa* failed to meet any specific prerequisite; rather, the district court denied the petition after a thorough inquiry into the nature and attitudes of French tribunals toward discovery.¹⁷⁶

The majority's holding creates a new threshold test that a district court must meet before it can deny a petition under section 1782 – that there is authoritative proof that the forum will reject the assistance.¹⁷⁷ In the past, the Second Circuit has rejected any prerequisite for granting a petition under section 1782.¹⁷⁸ In this case, the Second Circuit's only justification for its imposition of a threshold test for a denial of a section 1782 is the efficiency of the proceeding.¹⁷⁹ This bright line standard not only removes the district court's discretion, but it totally ignores the interest of the forum. If the purpose of the statute is to provide efficient *assistance* to the forum, then the district court should not be required to impose American-style discovery on a foreign nation. A true inquiry into the nature and attitudes of the foreign jurisdiction, like the one conducted in *Gianoli*, would reveal whether restrictions on pre-trial discovery were being circumvented, or whether the district court was providing efficient and desired assistance.

Section 1782 was intended to be a cooperative statute.¹⁸⁰ The *Euromepa* decision has turned this statute into a powerful tool allowing foreign litigants to replace their own country's discovery procedures

¹⁷⁵ *In re Application of Gianoli*, 3 F.3d 54, 60 (2d Cir. 1993).

¹⁷⁶ *In re Application of Euromepa*, 155 F.R.D. 80, 84 (S.D.N.Y. 1994).

¹⁷⁷ *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1100 (2d Cir. 1995).

¹⁷⁸ See *Gianoli*, 3 F.3d at 60; *In re Application of Malev Hungarian Airlines*, 964 F.2d 97, 101 (2d Cir. 1992), *cert. denied*, 113 S.Ct. 179 (1992).

¹⁷⁹ *Euromepa*, 51 F.3d at 1100.

¹⁸⁰ *John Deere Ltd. v. Sperry*, 754 F.2d 132, 135 (3rd Cir. 1985).

with the Federal Rules. This decision has created a great difference in the treatment a foreign litigant will receive, depending on the circuit in which they bring their request for discovery assistance.¹⁸¹ Instead of inspiring other circuits to follow the United States' generous example, *Euromepa* encourages confrontation with other judiciaries. This decision marks a departure from prior case law, and it will greatly change the tenor of international litigation. Although the Supreme Court has been unwilling to grant certiorari to cases interpreting section 1782, perhaps the *Euromepa* decision creates sufficient discord between the circuits, as well as between the United States and other nations, to warrant Supreme Court review.

RICHARD D. HAYGOOD

¹⁸¹ See, e.g., *In re Application of Asta Medica*, 981 F.2d 1 (1st Cir. 1992) (where litigants are required to show that the information sought would be discoverable in the forum country).

